D.T.E. 01-38

Tariff revisions to M.D.T.E. No. 17 filed with the Department of Telecommunications and Energy on January 12, 2001, for effect on February 11, 2001, by Verizon New England, Inc. d/b/a Verizon-Massachusetts

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ORDER ON MOTION FILED BY
AT&T COMMUNICATIONS OF NEW ENGLAND, INC. AND
COVAD COMMUNICATIONS COMPANY FOR RECONSIDERATION AND
FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

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D/B/A VERIZON MASSACHUSETTS
Respondent

# ORDER ON MOTION FILED BY AT&T COMMUNICATIONS OF NEW ENGLAND, INC. AND COVAD COMMUNICATIONS COMPANY FOR RECONSIDERATION AND FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

## I. BACKGROUND

On January 12, 2001, Verizon New England, Inc. d/b/a Verizon-Massachusetts ("Verizon") filed revisions to Tariff No. 17, to become effective February 11, 2001, with the Department of Telecommunications and Energy ("Department"). Specifically, Verizon proposed three revisions to Tariff No. 17. First, Verizon proposed to reduce the Department-approved rates for Meet Point A, Meet Point B, and Meet Point C interconnection arrangements. Verizon indicated that it was proposing these rate reductions to "flow through" applicable switching and transport rate reductions approved by the Department on October 13 and October 18, 2000.

Second, Verizon proposed to revise the methodology used to calculate the Unbundled TC Reciprocal Compensation ("UTCRC") rate. Verizon noted that it was proposing to replace the existing UTCRC rate structure, which uses the Meet Point B interconnection charge as a surrogate for the reciprocal compensation charges Verizon pays to competitive local exchange carriers ("CLECs"), with a rate structure that reflects the actual per minute reciprocal compensation charges that Verizon pays to CLECs. Furthermore, Verizon proposed to recalculate and file updated UTCRC rates for immediate effect on a quarterly basis.

Last, Verizon proposed to revise the collocation regulations regarding the application of power rates to provide for power on a "per load amp requested" basis rather than on a "per fused amp" basis.

In addition, Verizon introduced regulations for random inspections to verify actual power load drawn by physical collocation arrangements.

On January 24, 2001, the Department requested a letter of explanation from Verizon, and also notified parties in D.T.E. 98-57 (Phase I)[1] of the deadline established for comments on the proposed revisions. On February 1, 2001, Verizon filed its letter of explanation, and AT&T Communications of New England, Inc. ("AT&T") and Covad Communications Company ("Covad"), jointly, and Conversent Communications of Massachusetts, LLC ("Conversent"), individually, filed comments on the proposed revisions.

In their comments, AT&T and Covad petitioned the Department to investigate certain provisions of the January 12, 2001 tariff filing and to suspend and investigate certain other provisions. Specifically, AT&T and Covad objected to the proposed change that, they claim, would permit Verizon to charge a CLEC for more DC power than Verizon provisions to that CLEC, and also objected to the audit and inspection provisions. AT&T and Covad requested that the Department suspend and investigate Part E, Section 2.6.3.C (relating to DC power charges) and Part E, Sections 2.3.5.E. and 2.3.5.F (relating to inspections and audits). Similarly, Conversent commented on the proposed revisions relating to collocation power, stating that they were a step in the right direction, but

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[1] D.T.E. 98-57 began with the Department's investigation on its own motion as to the propriety of the rates and charges set forth in of M.D.T.E. Tariff No. 17, Verizon's interconnection tariff, filed on August 27, 1999. An Order was issued on the August 27, 1999 filing on March 24, 2000. In Phase I of D.T.E. 98-57, the Department continued its investigation as to the propriety of the rates and charges set forth in revisions to M.D.T.E. No. 17 filed with the Department by Verizon on September 21, October 5, October 12, November 2, and November 17, 2000. Further evidentiary hearings were held on December 14 and 15, 2000, and a final Phase I Order on the revisions has yet to be issued.

that the proposed revisions did not address Verizon's unreasonable practice of requiring CLECs to pay excessive rates for power that they do not use.

In its letter of explanation, Verizon stated that the proposed revisions relating to collocation power change the application of the DC power charge so that it applies only to the number of amps requested by a CLEC, rather than on a per fused amp basis as was the case in the then-existing tariff, and that the revisions substantially reduce the effective power charges. In addition, Verizon noted that the proposed revisions introduced regulations for random inspections to verify the actual power load drawn.

On February 15, 2001, the Department approved the proposed revisions. Parties in D.T.E. 98-57 (Phase I) were advised of the approval on February 16, 2001. On March 7, 2001, AT&T and Covad filed a joint Motion for Reconsideration and for Extension of the Judicial Appeal Period ("Motion"). Verizon and Conversent filed replies to the Motion on March 15, 2001. The Department docketed its review of this Motion as D.T.E. 01-38.[2]

Finally, on April 6, 2001, Verizon filed additional revisions to Tariff No. 17 pertaining to the application of DC power charges to collocation arrangements. The Department has requested comments on the April 6th revisions from parties to D.T.E. 98-57 Phase I.

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[2] Although the Department received comments from parties to D.T.E. 98-57 (Phase I) on the January 12, 2001 tariff revisions, and provided notice to these parties of the Department's approval of the revisions, the Department did not incorporate these revisions into its investigation in the D.T.E. 98-57 (Phase I) docket. Thus, the review of AT&T and Covad's Motion is docketed separately from D.T.E. 98-57 (Phase I).

## II. STANDARD OF REVIEW FOR RECONSIDERATION

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

## III. AT&T AND COVAD'S MOTION FOR RECONSIDERATION

A. Positions of the Commenters

1. AT&T and Covad

First, AT&T and Covad state that reconsideration is warranted in the present case since the Department approved the January 12, 2001 tariff without evidence or explanation in violation of the Administrative Procedures Act (Motion at 4). Specifically, AT&T and Covad claim that once a proposed rate is challenged, the burden is placed on the proposing utility to support it and, in the discharge of the Department's responsibility to determine that the proposed rate is just and reasonable, the Department must, under the Administrative Procedures Act, take evidence and make findings (id. at 5).

With regard to the revisions to the collocation power charges, AT&T and Covad maintain that because the January 12, 2001 tariff modifications permit Verizon to charge twice the amount permitted by the language of the previous tariff, the Department's approval, without evidence or explanation of the change, violates procedural requirements (Motion at 6). Moreover, AT&T and Covad argue that Verizon has not presented any evidence that the January 12, 2001 tariff revisions are reasonable (id.). In fact, AT&T and Covad note that the explanation Verizon provided on February 1, 2001 does not specifically reference the revision that permits Verizon to charge a multiple of the amps provisioned, where the multiple is based upon the number of feeds (id.). Accordingly, based upon the facts available, AT&T and Covad argue that Verizon's collocation power charges are unreasonable on their face and, thus, should have been suspended and investigated prior to approval (id. at 7-8).

Turning to the inspection and penalty provisions, AT&T and Covad argue that the approval of

these provisions, without evidence or explanation, also does not satisfy the requirements of the Administrative Procedures Act (id. at 9). AT&T and Covad claim that Verizon's February 1, 2001 explanation for inspections fails to satisfy Verizon's burden to demonstrate that the challenged provisions are reasonable (id.). Accordingly, AT&T and Covad contend that the Department's approval of the inspection and penalty provisions without a statement of reasons, including a determination of each issue of fact or law necessary to make its decision, constitutes reversible error for which reconsideration is warranted (id. at 11).

Second, AT&T and Covad state that the facts in the present case are similar to those in CTC Communications[3] where reconsideration was granted based upon the finding that there was an inadequate opportunity for parties to present evidence and argument on an issue decided in a final order (Motion at 12). In the case at hand, AT&T and Covad claim that after filing their preliminary comments on the January 12, 2001 filing, they had anticipated that the Department would suspend and investigate the tariff because the comments revealed a material issue (id.). AT&T and Covad contend that the Department gave no indication that it intended to make a decision on the tariff revisions which increases collocation power rates without taking additional evidence or providing further process and, consequently, AT&T and Covad assert that the Department should grant their motion for reconsideration (id.)

Third, AT&T and Covad state that Verizon currently has in effect a tariff that purportedly

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[3] Petition of CTC Communications Corp., D.T.E. 98-18-A (Dec. 17, 1997) ("CTC Communications")

allows it to collect charges that are multiple times higher than the cost of the service it renders, and even though the Department has stated it will address DC power rates in D.T.E. 01-20, AT&T and Covad claim that the investigation in that proceeding does not address the need to prevent overcharges that the current tariff purportedly allows (id. at 12-13). Accordingly, AT&T and Covad urge the Department to act expeditiously to prevent the accumulation of additional damages for which AT&T and Covad would seek relief in their collocation complaint against Verizon for over-collection of DC power charges[4] (id. at 13).

Finally, AT&T and Covad state that there is good cause for granting their joint request for stay of the judicial appeal period because they seek this stay in order to avoid burdening the Supreme Judicial Court with an appeal that can be avoided by further proceedings at the Department (Motion at 14).

2. Verizon

Verizon states that the filing of a proposed tariff does not require the Department to commence an adjudicatory proceeding, and that the decision to suspend a proposed tariff for investigation is within the Department's discretion (Verizon Reply at 4). Thus, Verizon argues, the procedural requirements associated with adjudications under G.L. c. 30A were never triggered by its January 12, 2001 tariff

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[4] On February 22, 2001, AT&T and Covad filed a joint complaint against Verizon alleging that Verizon failed to charge the filed rate for DC power provided to collocation carriers under Verizon's D.T.E. Tariff No. 17 in effect prior to the January 12, 2001 proposed revisions and, thus, has overcharged collocating carriers for DC power. The complaint requests that the Department order Verizon to refund the over-charge, with interest, and cease and desist from such activity in the future. The Department docketed its investigation into this matter as D.T.E. 01-39.

filing (id.).

More precisely, Verizon contends that, contrary to AT&T and Covad's claim, the fact that a tariff is challenged does not require the Department to suspend it, or require the Department to open an adjudicatory proceeding (id.). Citing New England Telephone and Telegraph Company, D.P.U. 97-18-A (1997) ("D.P.U 97-18-A"), Verizon asserts that procedural rights accrue to putative parties only if the Department exercises its discretion to suspend and investigate a proposed tariff (id. at 4-6). Accordingly, Verizon argues that AT&T and Covad have no right under state law to an adjudicatory proceeding and have no right to appeal the Department's decision to permit tariffs to go into effect without suspension (id. at 6).

Verizon further argues that AT&T and Covad's reliance on CTC Communications is misplaced and, thus, the Department's decision not to suspend Verizon's proposed tariff was consistent with due process (id.). Verizon notes that the cause of the due process violation leading to the granting of Verizon's reconsideration request in CTC Communications was because Verizon was led to believe that the Department intended to act only with respect to the scope of the proceedings, rather than the merits of the pending matter (id. at 7). However, in the present case, Verizon notes that nothing in the procedural memorandum of January 24, 2001 requesting comments on the January 12, 2001 tariff revisions suggested that the Department intended to hold evidentiary hearings (id.).

Additionally, Verizon contends that, prior to the January 12, 2001 revisions, Tariff No. 17 permitted Verizon to charge for DC power on a per fused amp, per load basis, and that the Motion mischaracterizes the changes proposed by Verizon (Verizon Reply at 8). Verizon states that its proposed tariff changes, which were explained in Verizon's February 1, 2001 letter, decreases the DC

power charges assessed under Tariff No. 17 by applying the power charge to the number of load amps requested by the CLEC, rather than the number of fused amps made available to the CLEC's collocation arrangement (id.).

Lastly, Verizon argues that AT&T and Covad's request for a stay of the judicial appeal period must be denied for two reasons (Verizon Reply at 9). First, Verizon asserts that because the Department did not institute an adjudicatory proceeding to investigate the January 12, 2001 tariff revisions, there were no parties to an adjudication of the tariff changes and thus, AT&T and Covad have no standing to file an appeal under G.L. c. 25 § 5 (id.). Secondly, Verizon maintains that, even if AT&T and Covad have a right to appeal, they have not established good cause that would merit an extension (id.). Consequently, Verizon urges the Department to deny the request for a stay of the judicial appeal period.

3. Conversent

Conversent supports AT&T and Covad's Motion, stating that Verizon's billing practices for power costs were unreasonable and discriminatory prior to its January 12, 2001 tariff filing and continue to be unreasonable and discriminatory following the January 12, 2001 tariff filing (Conversent Reply at 1). Conversent notes that it recently filed an ex-parte letter with the Federal Communications Commission ("FCC") in connection with Verizon's power costs where, among other things, Conversent has urged the FCC to prohibit incumbent local exchange carriers from charging for power on a per feed basis unless that power is actually drawn (id.).

B. Analysis and Findings

Under G.L. c. 159 §§ 19 and 20, the Department has broad discretion to determine the structure of the investigations of tariff filings by common carriers, including whether to suspend such filings or allow them to go into effect without suspension or investigation. In fact, the Department is not required to conduct evidentiary or public hearings under G.L. c. 159 §§ 19 and 20 unless a tariff revision constitutes a request for a general rate increase, or if the Department establishes an adjudicatory proceeding. Moreover, the right to file for reconsideration only applies to Department adjudications, and then only to parties to that adjudication. See G.L. c. 30A §§ 1(1) and 1(3); 220 C.M.R. §§ 1.03(2) and 1.11(10). In the present case, the Department did not suspend the January 12, 2001 tariff revisions and, more importantly, did not open a G.L. c. 30A adjudicatory proceeding into the January 12, 2001 tariff revisions. Nor was the filing a request for a general rate increase which would have required evidentiary hearings to be held. Thus, there is no proceeding from which reconsideration or appeal is permissible.

Furthermore, Verizon correctly notes that AT&T and Covad's reliance on CTC Communications in support of their Motion is misplaced. In CTC Communications, the Department docketed the complaint, duly noticed the case, accepted intervention, and held a public hearing and procedural conference in the proceeding, none of which were performed in the present case. More importantly, in CTC Communications, after reviewing the transcript of the procedural conference, the Department concluded that "Bell Atlantic and its counsel could reasonably have believed that the Department would issue an order on the scope of the proceeding before reaching the merits of CTC's claims." Id. at 9-10. Thus, CTC Communications is distinguishable from the situation at hand where there was no indication whatsoever that the Department intended to conduct further proceedings on the

January 12, 2001 revisions.

Comments on the tariff revisions were requested by the Hearing Officer, but this does not establish an adjudicatory proceeding. Pursuant to C.M.R. § 1.04(d), comments complaining of and seeking suspension on a tariff may be filed with the Department within ten days before the effective date of the tariff. The Hearing Officer memorandum in this case served merely to remind those with interests in the filing of their right to comment. The comments on the January 12, 2001 tariff revisions were to assist the Department in the exercise of its discretion, granted under G.L. c. 159 §§ 19 and 20, to determine whether to suspend the January 12, 2001 filing, to allow it to go into effect without suspension, or to establish an adjudicatory proceeding. In fact, the Department routinely reminds interested entities of their procedural right under C.M.R. 104(d) to weigh in with the Department as to whether to suspend a particular filing.[5] As we stated in D.P.U. 97-18-A, "it is the nature of the tariff filing (e.g., a general rate increase) or the Department's determination to conduct an adjudicatory proceeding, that confers certain procedural rights on parties to that proceeding." Id. at 6. Because no adjudicatory proceeding pertaining to the January 12, 2001 tariff filing was established to which AT&T and Covad were parties, nor did the tariff revisions represent a general rate increase, we find that AT&T and Covad lack standing to seek reconsideration of our approval of the January 12, 2001 tariff revisions. Accordingly, we deny the motion for reconsideration and the request for an extension of the

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[5] See, e.g., Verizon's Sixth Annual Price Cap Compliance Filing, D.T.E. 00-101 (where the Department invited comments on the issue of suspension of Verizon's filing to be submitted prior to the public hearing, or to be made orally by any interested person at the public hearing).

judicial appeal period.[6]

Lastly, on April 6, 2001, Verizon filed revisions to Tariff No. 17 pertaining to the application of DC power charges provided to collocation arrangements. The Department informed interested persons, namely parties to D.T.E. 98-57 (Phase I) of the deadline to file comments to assist the Department in its determination as to whether to suspend the tariff revisions, to allow the revisions to take effect without suspension, or to open an investigation into the revisions. Several CLECs, including AT&T and Covad, filed comments on the revisions on April 13, 2001.[7] On May 2, 2001, the Department allowed the April 6, 2001 revisions to take effect, pending investigation in Phase IV of D.T.E. 98-57. The April 6, 2001 revisions supercede the January 12, 2001 filing.

Our final decision as to the disposition of the April 6, 2001 revisions is still pending, but we note that the April 6, 2001 revisions appear to mollify, at least in part, AT&T and Covad's concerns raised in their Motion.[8] Specifically, we note that Part E, Section 2.2.1.B.1 of Verizon's April 6th filing contains clarifying language on the application of DC power charges that addresses the concerns raised by AT&T and Covad relating to DC power charges being multiplied by the number of feeds. Moreover, Verizon's April 6th filing revises the inspection and penalty provisions by including additional

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6 We clarify that it is our conclusion that AT&T and Covad were not parties to any adjudicatory proceeding, and therefore lack standing to seek reconsideration. It is from this conclusion that AT&T and Covad may appeal.

7 AT&T and Covad, along with Allegiance Telecommunications of Massachusetts, Inc., filed joint comments, and Sprint Communications Company, L.P., Conversent Communications of New England, LLC, and WorldCom, Inc., individually, filed comments. Verizon filed its reply on April 18, 2001.

8 We note, however, AT&T and Covad continue to have concerns regarding the proposed April 6, 2001 revisions.

notification procedures by Verizon, and placing limitations on the penalty provisions including a ten percent buffer on the power drawn, as well as eliminating the charges for inspections unless power drawn exceeds the power requested plus the ten percent buffer. See Part E, Sections 2.3.5.E. We do not address the reasonableness of the April 6, 2001 tariff revisions here, but we note that this filing continues our review, on a going-forward basis, of some of the substantive concerns raised by AT&T and Covad with the previous January 12, 2001 filing.[9]

For the aforementioned reasons, the Department denies the Motion for Reconsideration and the Request for Extension of the Judicial Appeal Period. The Department emphasizes that its review of collocation power rates is continuing in the D.T.E. 01-20 docket[10] as well as our separate review of the terms and conditions for the provision of DC power contained in the April 6, 2001 revisions to Tariff No. 17.

## IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion for Reconsideration filed by AT&T Communications of New

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9 However, we note that if the April 6, 2001 tariff filing is approved, AT&T and Covad's concern with the January 12, 2001 tariff filing, regarding collocation power rates being multiplied by the number of feeds, would be rendered moot.

10 As we have indicated in our Reply Comments, dated February 28, 2001, to the FCC in CC Docket Number 01-9, Application of Verizon New England, Inc., et al., for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services in Massachusetts, the Department will review collocation power rates in our D.T.E. 01-20 proceeding.

England, Inc. and Covad Communications Company be and hereby is DENIED; and it is

FURTHER ORDERED: That the Motion for Extension of the Judicial Appeal Period filed by AT&T Communications of New England, Inc. and Covad Communications Company be and hereby is DENIED; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow

upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).